United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2537

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ANTHONY B. CATALDO, and
ADA W. CATALDO,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

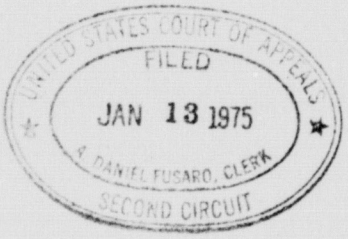
Docket No. 74-2537

In the Matter of the Civil Contempt of

ANTHONY B. CATALDO

Appellant.

APPELLANT's BRIEF and AFFIDAVIT



111 Broadway

ANTHONY B. CATALDO
~~ONE CEDAR STREET~~
NEW YORK 5, N.Y.
Attorney for Appellant

TABLE OF CONTENTS OF BRIEF

CASES CITED

STATUTES AND AUTHORITIES

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -x

ANTHONY B. CATALDO, and

ADA W. CATALDO,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

- - - - - - - - -

In the Matter of the Civil Contempt of ANTHONY B. CATALDO

Appellant.

- -x

APPELLANTS' BRIEF

QUESTIONS INVOLVED

1. Was the order holding appellant for contempt a Civil Contempt or a Criminal Contempt?

2. Was it reversible error to deny appellant's motion to vacate the order or to resettle it so that appellant might have a review of the same, because of the misdescription of the order as found by this court on a previous appeal.

STATEMENT OF THE CASE

Appellant is an attorney at law duly admitted to practice law in the State of New York and admitted to the bar of this court, the Eastern and Southern Districts of New York, to the United States Court of Appeals of the Fourth Circuit and to the United States Supreme Court(All)*

Appellant and his wife were plaintiffs in a suit to recover alleged income taxes unlawfully collected from them for 1963(All). That suit was started in the United

*References are to pages of the appendix unless otherwise identified.

States District Court for the Southern District of New York, under docket No. 69 Civ. 407. The amount involved was about $2700. The appellant appeared for the plaintiffs, appearing for himself pro se. He planned to try the case himself if he could not get a just settlement. The suit was assigned to several district judges for trial, the last time to the Hon. Richard H. Levet.

Under the handling by Judge Levet, the case, although carefully prepared for trial by plaintiff, complete with brief and citations to the most recent cases,was turned into a nightmarish trial for appellant by the unlawful directions of the trial judge to put in the evidence as the judge directed and to avoid issues, the judge did not understand or was impatient to hear about, or the judge threatened, that he would hold appellant for contempt. He did hold appellant for contempt by a decision during trial(A9) and after trial, an order was entered on May 18, 1974, within the Civil Suit entitled "In the Matter of the Civil Contempt of Anthony B. Cataldo" sub-joined to the caption of the civil suit.

The trial had been had on May 10, 11, and 14, 1973(1). The suit was dismissed. Plaintiffs duly appealed assigning several errors among them that certain material facts found had no support in the record, that there were misapplications of the burden of proof and errors in excluding evidence. Also, plaintiffs complained to this court that several irregularities had

been committed by defense counsel and by the Judge's secretary. The former had suborned perjury and the latter had participated in the judicial process to an unlawful extent(2, appellant's brief on prior appeal). Also pressed as grounds for reversal was the unfairness of the trial court's action in threatening to and in holding the power of contempt over appellant's head, when appellant had not given cause for the exercise of such power but was hopeful that the judge would eventually be convinced of the correctness of appellant's claims, and so, appellant carefully kept within the proper bounds of advocacy, and tried with great deference to the court's irascibility and impatience to make a record for review by this court. He purposely exercised restraint and courtesy towards the judge, having faith in his powers of understanding; and hoping that the judge would exercise his judicial discretion to solve the problems upon which plaintiff sought to be heard. But all was in vain. All the erroneous claims to law and unproven fact claims of defense counsel were adopted. If this court was today to consider plaintiff's claims on their merits, this court would necessarily find that plaintiffs had lawfully proven their entitlement to the remedies they sought.

Plaintiffs duly appealed the dismissal of their

cause and sought to bring up for review the order of Civil Contempt that was entered after trial(A18). This court affirmed the dismissal without discussing any of the serious errors that had been presented to it(A18). It refused to review the order of contempt holding a separate appeal had to be taken from that because it held also that such an order was for a criminal contempt, and as it wasn't, the court said, it did not have jurisdiction(A19). Further, this court stated in a footnote(A19):

> "Although Cataldo was summoned to show cause why he should not be held for Civil Contempt, both appellants and appellee now treat the contempt judgement as if it were criminal in nature and indeed, it would seem likely in light of the circumstances surrounding it that it was the judge's intent that it should be so construed."

Thereafter, appellant duly moved the district court to vacate the order of contempt of May 18, 1973 because of its error in naming the order as one for Civil Contempt which had caused an appeal only from the final judgement entered in the principal action(A12-A19). At the same time, appellant also moved in the event that the court would not vacate the order, to resettle the order as a criminal contempt order and re=enter it, so that appellant could appeal from it(A17). Judge Levet denied the motion and this appeal duly followed therefrom(A22-A24).

POINT I

THIS COURT ERRED IN PRESUMING THAT THE ORDER OF CONTEMPT WAS NOT APPEALABLE, AND, WHEN ASKED TO CORRECT THE ORDER IN THE LIGHT OF THIS COURT'S DECISION, JUDGE LEVET ERRED IN NOT CORRECTING IT.

This court's action in treating with the order of contempt is necessarily a part of the complex of facts to be considered on this appeal. This is no attempt to re-argue the prior appeal, which action would be out-of-time anyway. It is an attempt to rescue appellant's rights out of the maze of legalese which obscures the truth and right of the matter. Appellant relies upon the inherent power of this court to control its own decision to recognize its errors, if such a recognition becomes necessary on this appeal and, of course, appellant relies also upon Rule 52(b)of the Rules of Criminal Procedure. He relies upon the facts and the law to show that the order of contempt has no merits and it was unlawfully made and it should be vacated. While the thread of timliness for this review is slender, it nevertheless exists to negate the possibility of that other legal fiction that appellant has waived his right to review the order by not proceeding timely.

a. The error of this court.

There is no support in the record for this court's statement that Judge Levet intended a criminal contempt rather than a civil contempt. There is absolutely no s[illegible]ment in

the record expressive of this fact. Even in its order of denial of appellant's later motion, which is the order appealed from Judge Levet does not support this court's thinking. Judge Levet states that his dismissal was affirmed but was silent about this court's view that a criminal contempt had been intended. Taking hold of one and not the other would indicate that Judge Levet could not approve of this court's statement. Neither the order of contempt, nor the order appealed from were ever entered in the criminal docket of the district court. Indeed, the honorable judge seems to say that he considered the merits of his making the order and could find no basis for granting the vacation of his order and so he denied it.

Nor was there ever any order to show cause issued. It was claimed by the order of contempt, but no such order was in fact issued and the record is barren of any such thing happening.

Nor was it a fair reading of appellant's arguement on the prior appeal that the order was incorrectly denominated a Civil Contempt, to say appellant was treating that as a lawfully entered order for a Criminal Contempt from which he was required to appeal separately from the appeal of the principal case. Appellant had said that Judge Levet had erred in calling it a Civil Contempt.

Appellant was not thus accepting the order as a lawfully entered criminal contempt. He was seeking to establish its unlawfulness and that appellant was entitled to a reversal by showing that it was not a civil contempt and that there had never been any conduct by appellant that was contemptuous. Even arguing that Judge Levet was breaking the law himself by threatening appellant with contempt to force him to forego his plan for the trial of his case, an argument that was made in this court only, could not be considered contemptuous conduct, see Parmelee Transportation Company v. Keeshin, 292 F.(2) 806, and its companion case, In re McConnell, 370 U.S. 230.

A lawyer has the right to try the case in the manner he thinks it best for his client so long as he does not obstruct the trial. The power of contempt should not be used to keep evidence out of the record or to limit the issues to be tried so as to support the Government in a tax refund suit. This last happened in the court below. The record shows as early as the seventh page of the transcript that the court was ready to use its power of contempt to coerce plaintiff into trying the case the court's way(A5). The court had in chambers referred to its power of contempt despite the informality that pervaded the usual pre-trial conferences. Such a hostile attitude towards plaintiff was not only unwarranted, but it presaged the very trying

time that appellant had despite his experience as a trial lawyer and his knowledge of the law gained from forty years of research. A judge ordinarily does not warn a lawyer at the outset of trial that he would hold him for contempt and repeats that warning on the same page of the transcript when nothing contemptuous had occurred, except to intimidate the lawyer.

This court did not understand this hostile attitude of the judge towards appellant or, it is respectfully submitted, it would not have made lawful an unlawful dismissal and it would not have refused to review the contempt order on its merits. The points of view of both courts regarding the reviewability of the order of contempt are plain errors calling for reversal. The fact is that appellant has not had a review of the contempt order on its merits despite the fact that his appeal from the order as a civil contempt was timely and this appeal is timely and there has been no waiver of his right to such review by appellant.

b. Judge Levet's erroneous treatment of the motion to vacate or resettle the order for contempt.

The order appealed from does not treat of the error of calling the order of contempt a civil contempt, but drops that issue like a hot potato. Yet, this was the sole issue placed before the court and it was overlooked.

The court below speaks of this court's refusal to review the contempt order as though that decision had reviewed the merits when plainly it had not. The footnote mentioned above was not adverted to by the district court. Yet, that was of basic importance for the United States attorney was calling the motion to correct the order, a collateral attack so that he could claim res judicata which does not apply anyway to a decision not on the merits. Such gross misstatements of the law and facts are not excusable on the ground of a mere mistake. Instead of adverting to appellant's warning regarding defense counsel's untenable claims to untruthful facts (the same assistant United States attorney had, in this Court, treated the orginal order of contempt as a criminal contempt, so that, he could not have overlooked the fact that this court had never passed upon the merits of the order), the district court, nevertheless, ignored plaintiff's warning and adopted another of defense counsel's sham claims.

The court below took time out in writing its decision, to acknowledge receipt of a letter from appellant and to attach it to the decision. Yet, that letter is a plea for the court's consideration of the sole point at issue and not to be distracted as it had been on the trial by that same counsel's use of irresponsible claims to law. Its refusal to correct its error or to allow appellant an opportunity to

review its order was more than its adoption of defense counsel's claims to inapplicable law and false facts, a plain error as defined by said Rule 52(b) of the Criminal Rules.

POINT II

WAS THE ORIGINAL ORDER OF CONTEMPT ONE FOR A CIVIL CONTEMPT OR ONE FOR A CRIMINAL CONTEMPT.

Plaintiffs are husband and wife; the husband is an attorney at law in good standing actively engaged in the practice of law in this city. Plaintiffs sued to recover a sum of money they had paid when the defendant issued an assessment for additional income taxes for 1963. The assessment, plaintiffs alleged was an arbitrary and capricious one. At issue was the disallowance of some of the expenses of the lawyer's practice. The lawyer-plaintiff acted as trial counsel for his wife and himself. During the trial the court held plaintiff-counsel in contempt, at page 80 of the trial minutes (A8). The plaintiff-counsel objected to the relevance of a question by defense counsel who in responding to questions from the bench had misstated a fact concerning plaintiff-lawyer's business. The following occurred:

> "Mr. Cataldo: That's not what happened.
>
> The Court: Will you please be quiet until I call upon you. Once more let me remind

you that this little matter of contempt is going to hang over your head for a while, unless you conduct yourself properly.

Mr. Cataldo: This gentlemen is accusing me, Judge.

The Court: What's that,

Mr. Cataldo: This gentlemen is accusing me of taking money ---

The Court: I am going to hold you in contempt now unless you have some explanation that is worth while. I am going to fine you $50. You keep quiet unless you are called upon. That's it I will entertain an application later to suspend it."

Prior to this event, the court kept referring to its power to hold one for contempt as a means of coercing plaintiff into putting his case in as directed by the court (A5). As early as page 7 (A5) of the trial minutes the court refused to permit appellant to question the witness on one line of question after he had sustained objections on another line, and said:

"The Court: I ruled. I am not going to listen to you. If you go on, I am going to consider holding you for contempt. I am not going to allow it. Now you know it."

The "now you know it" indicates an intransigent frame of mind against appellant proceeding with issues which the court would not permit because they were not what he was expecting at the time. The facts of a case do not always follow a pattern which a judge might anticipate. Appellant wanted to show that the deficiency letter was an arbitrary and capricious act by showing that disallwances of business

expenses were made of amounts that had no relationship to any claimed business expenses. The court wanted evidence on the proof of the business character of certain claimed business expenses. If the deficiency were proven to be arbitrary or capricious, the whole of it would be stricken and the burden of establishing the non-deductibility of expense would pass to defendant. The court was not aware of appellant's trial procedure. He wanted to explain but the court would not listen. Instead, "contempt", it shouted; "do it my way" and that way was adopted to avoid alleged disobedience and plaintiff got a dismissal. As that method did not do justice to plaintiff's case, following the court's direction meant keeping the lawyer from putting in the evidence the lawyer believed was necessary to support his case. Nevertheless, the lawyer did abandon his theory of proof and did as he was directed by the court. However, at the end of the trial the court granted plaintiff permission to submit a list of issues and the nature of his proof, which he believed the court had not allowed into the record. Thereafter, the following occurred regarding the contempt, at page 404-405 of the transcript.

> "Mr. Cataldo: I respectfully move your honor to remit the penalty because as I told you before---
>
> The Court: All right. I will decide that after I learn what you submit, what further

proceedings there have to be had herein."
Plaintiff made a motion to adduce additional evidence and and also plaintiff wrote a letter dated May 16, 1973 outlining his reasons why a contempt of court was not committed by him(A2). On May 18, 1973, the Court, without waiting for the remainder of the case to be submitted to it, entered the order of civil contempt(A4). On June 29, 1973 the Court dismissed the suit.

A timely appeal was taken from the judgment entered. The Court of Appeals affirmed the judgment but, as to the order of contempt it said that it had no jurisdiction as a separate appeal had not been taken from that order. Then it added that the parties had treated the contempt as a criminal contempt and that the district court had "intended" the order to be for criminal contempt. Result. Plaintiff did not get a review of the order of contempt because of the fact that he had acted upon the order as a civil contempt which is the way the order is described by the district court. Hence, plaintiff moved the district court to vacate the order as made, or if the court would not vacate it, then it should take such action as may be necessary to insure a review of it to plaintiff (A12-A17). There was no doubt about it that this court meant to hold the attorney for civil contempt, the surmise of the Court of Appeals to the contrary notwithstanding. There were no actions by the attorney that were disrespectful of justice, or obstructed justice; there was

no intention on his part to do either, and no such action or intention is recited in the order. Nor was there any loud, boisterous, insolent language used. Nor was he charged with any such conduct. Nor was there any conduct wilfully designed to interfere with the court's operations. No such wilful conduct is charged in the order. The fine levied sought to coerce plaintiff-lawyer into an act to be performed in the future (to put in his case as the court directed), not to levy a punishment for a past act. Criminal contempt applies to a refusal to keep the status quo; see 3 Wright, Federal Practice and Procedure, Criminal, Section 702.

Also the court had a party plaintiff pay $50. to the party defendant for an alleged disobedience. This sort of coersion and of payment is an example of a civil contempt remedy. See, NYE v. United States, 313 U.S. 33; Gompers v. Buck's Stove and Range Co., 221 U.S. 418, 443, 444; Civil and Criminal Contempts in the Federal Court, 1947, 57 Yale L.J. 83; Duel v. Duell, 178 F.(2) 683 and Penfield Co. v. S.E.C., 330 U.S. 585.

Furthermore, the order of contempt was not registered in the criminal docket of the District Court. It was recorded only in the civil docket in the pages relating to the civil litigation as is shown in the above caption. As Rule 4(b) of the Appellate Rules states that

appeals from criminal judgments may be taken ten days from date of docketing in the criminal docket an appeal from the original order of contempt may still be taken. This appeal was taken from an order denying appellant's motion to vacate the original order brings the matter to the court for review.

Wright and Miller, in their treatise, Federal Practice & Procedure, in Volume 11, say at page 592, "A civil contempt order is interlocutory and as to a party to a litigation an appeal is not available until there is a final judgment." See, also, Duell v. Duell, 178 F. (2) 683, 14 A.L.R. (2) 560: 3 Wright, Federal Practice & Procedure, Criminal, Section 715. On the other hand, a criminal contempt is reviewable by a separate appeal.

How else could plaintiff have the order of contempt in question reviewed except on an appeal from the judgment in the civil suit. If the district court had called it a civil contempt, it erred to plaintiff's prejudice, because it kept plaintiff from treating it as a criminal contempt and appealing separately from it. In any event, this court erred in refusing to review the order on the prior appeal and the district court erred in not undertaking its lawful duty of correcting its own error.

POINT III

THERE WAS NEITHER A CIVIL CONTEMPT NOR A CRIMINAL CONTEMPT COMMITTED.

Of course, the trial is over. Judgment was entered. Hence, there was no longer a need for a civil contempt. Whatever was done is recorded in the transcript which is on file. This Court may scour that record and it will not find a single instance of any contemptuous conduct by the plaintiff-lawyer, whether of the civil or criminal kind.

It must be quickly stated that if a lawyer believes that what he is doing during a trial is for the purpose of advancing his client's case in the discharge of his duty, as the attorney for such party, that conduct alone is not contemptuous, but is only the fulfillment of his duty. To hold that conduct to be contemptuous, that action and expressions of the lawyer would have to be obviously designed to obstruct justice or to impede the administration of justice; see Parmelee Transportation Company v. Keeshin, 292 F.(2) 806; and In re McConnell, 370 U.S. 230. These two cases are companion cases. Co-counsel for the plaintiff, Parmelee Transportation Company were held for contempt for separate statements they made during their presentation of the plaintiff's case. In each case, the lawyers insisted on offering proof of their

clients cause and the trial court ruled against the admissibility of the evidence. Then for their statements made in support of the offers, the lawyers were held for contempt. Both lawyers were, on appeal, exonerated of the contempt charges. The Supreme court said in McConnell, "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create any obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even for conduct so near to the court as actually to obstruct justice, it is also essential to fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients cases. An independent judiciary and a vigorous independent bar are both indispensible parts of our system of justice."

Here, nothing, but not a single act of the plaintiff-lawyer was done to harass, impede or obstruct the judicial operation of the trial. At all the times that the court assumed the need to stress to the alleged contemnor its power of contempt, it was only when the plaintiff-lawyer offered evidence in support of his case.

As stated by the Supreme Court, such action was not contemptuous but it was the performance of his duty.

That is the law of the State of New York; see Spector v. Allen, 281 N.Y. 251, 260; Matter of Rotwein, 291 N.Y. 116, 123, 124; In Matter of Robert Boasberg, 286 App. Div. 951; 9 N.Y. Jur., Contempt, see 3; and Matter of Sheridan v. Kennedy, 12 A.D. (2) 332.

POINT IV

THE ORDER OF ALLEGED CONTEMPT UNDER REVIEW WAS IMPROPER AS TO FORM AND FAILED TO STATE FACTS WHICH COULD SUPPORT THE CHARGE.

The original order of contempt contains no specifaction of the acts of contempt committed. Only a conclusion by the court, that after having adminishing appellant not to argue evidentiary rulings of the court he was required to show cause why he should not be held for civil contempt, that a hearing was held on the 11th and 14th days of May, 1973 and it was adjudged that the plaintiff-lawyer was guilty of contempt of court and was fined $50.

There was no description of the acts of the alleged contemnor in such order, there was no show cause order made, there was no hearing held, and there is no finding of any facts that would be contemptuous. It is advisable to read Moore's Federal Practice, Vol. 8a Section 42.04(3) and Section 42.05.

The only proceedings regarding contempt occurred during trial and they are not set forth in the order. The failure of the order to recite the events renders it nugatory. See Rule 42(a) of the Federal Rules of Criminal Procedure. There were no separate hearings on the contempt charges as is alleged in the order.

As the record shows, the trial was not delayed one whit by anything said or done by the alleged contemnor. Also the record shows that there were never any specifications by the court that any particular lines of testimony should not be pressed but was pressed despite such direction, and that, in fact, the record will show compliance with the court's direction rather than disobedience. The order fails to sustain the charges of contempt made; see Caldwell v. United States, 28 F.(2) 684; Tauber v. Gordon, 350 F.(2) 843; and 3 Wright, Federal Practice and Procedure, Criminal, Section 708.

The Tauber v. Gordon case is one in point with the case at bar. If anything the specification of contempt conduct was somewhat more particularized in Gordon than they are in the order in this case, and the Court of Appeals set aside that order.

Also Peo. ex rel Barnes v. Court of Sessions, 147 N.Y. 290, states the general law applicable to contempt and the order thereon and rules that such must state

the acts said to be contemptuous in specific form or it will be insufficient to support the contempt charge. Such was the case of Pietsche v. Pres. of the U.S., 434 F.(2) 861, where this Court vacated an order of contempt by the late Judge Rosalind. There were no specifications of the nature of the alleged contemptuous acts of the defendant. Such an order could not be reviewed and it was held to be insufficient to support a charge of contempt. The case of U.S. v. Marshall, (9 C.A.) 451 F.(2) 972, followed. That court believed it best to set aside the order for its failure to state sufficient facts spelling out the contemptuous conduct to discourage a too ready use of the power of contempt by the district court. Comparing the atmosphere of the trial in the Marshall case to the atmosphere in this trial, there can be no question but that an impartial observer would find that the trial court in Marshall was hard pressed by the riotous conditions created by the defendants; whereas, here, the trial court had taken to bullying a defenseless counsel trying to try his own case and being apologetic about it.

WHEREFORE, it is respectfully prayed that this court vacate said order of May 18, 1974 and remit the penalty with compensatory costs to appellant.

Respectfully submitted,

ANTHONY B. CATALDO
Attorney pro se

APPENDIX

TABLE OF CONTENTS

APPROPRIATE DOCKET ENTRIES

May 10, 1973-Non-Jury trial begun and continued before Levet J.

May 11, 1973-Trial continued.

May 14, 1973-Trial continued and Concluded. Dec. reserves

May 18, 1973-Filed ORDER: Adjudged that Anthony B. Cataldo is guilty of contempt of court, and it is further adjudged that said Anthony B. Cataldo be fined the sum of Fifty ($50.00) Dollars. Levet J. and Clerk.

September 17, 1973-Filed plaintiff's notice of appeal from final judgment dismissing this action.

September 28, 1973-Filed Transcript of Trial.

September 17, 1974-Filed copy of mandate and order from USCA

October 11, 1974-Filed affidavit of David P. Land in opposition to motion by Anthony B. Cataldo re: Contempt Fine.

October 17, 1974-Filed MEMO-decision #41316, motion denied

October 10, 1974-Filed plaintiff's affidavit and notice of motion

October 10, 1974-Filed plaintiff's brief in support of motion re: penalty

November 15, 1974-Filed plaintiff's notice of appeal to the USCA.

LAW OFFICES
ANTHONY B. CATALDO

111 BROADWAY
NEW YORK, N.Y. 10006

962-0965

CABLES: LAWSABCAT

May 16, 1973

69 Civ. 407

Cataldo v. U.S.A.

Hon. Richard H. Levet
Judge United States District Court
United States District Court
Foley Square
New York, N.Y. 10007

Dear Sir:

I received the check I was waiting for this morning. I enclose my check to the order of the court for $50. I cannot afford payment of this sum for a cause that is seriously in dispute like this with no benefit in return to boot. I am sure that I showed no contempt for your honor. The only cause you spoke of was that I talked after you had ruled. What actually happened could not justify your assessing a fine. There was no disruption of the proceedings. Approaching the trial, I had assumed the view beforehand that you were a knowledgeable lawyer and a dedicated judge. This led me to believe that you would make the right decision when all the facts were in. Getting the facts in with the many obstacles put in my path was not an easy thing, but I tried. Where is there any undignified conduct exhibited by me?

Your decision on how I was to proceed to put in my case non-plussed me. It was not conducive to the best result for me. Your treatment of the separate items upset me. They were treated contrary to the plain wording of the regulations which I had read and the case law which I had read in preparation for the trial. The part played by your Mr. Madden dismayed me. I shall discuss this at length in my post-trial papers. Had I known of the extent of his participation in the judicial process, I would never have waived the jury.

Altogether there was too much bias against my case. It showed all over. There didn't seem to be anything I could do about it except to carry on stoically making a record as best as I could and as circumstances would permit. Imagine! Several times I was directed not to make an offer of proof. Yet every effort was made without interferring with your honor's prerogatives. In fact, I understood your position.

Before coming to your court I had tried to prove to jaundiced tax reviewers, non-lawyers, that a lawyer has to spend money to attract clients. Friends without need for lawyers will permit a lawyer and his family to starve. I found deaf ears and unsound legal principles being propounded by the auditors. Then an arbitrary assessment was made as expressed by the deficiency notice. I paid to avail myself of the law which provided a people's forum, the district court. Then I found opposing my suit for refund an ambitious young lawyer whose eagerness to make a name for himself led him to make fine distinctions between personal and business that defied the facts. At the trial he went so far as to commit the greatest sin for a lawyer, the presentation of a known untruth on a material point. Your honor did not get that slant of the case. Instead from the beginning you showed your bias against me, assuming that only my adversary could be relied on to tell you the truth and threatening to hold me in contempt if I tried to correct a false statement of fact presented by him. Your remarks about losing the diary and of my having hidden cash reserves which was used to pay off my personal expenses when there were no facts to support either idea and the truth is that I, an honest lawyer, have made only a meager living, disclosed your inner thoughts. These biased remarks I objected to and they should be found in the record. Truly tney were unworthy of what I had believed of you.

Really, if I could not tell you the facts, to whom could I tell them or where else could I go? Consequently, I respectfully ask your honor to consider this view point and find it proper and just to remit the penalty.

Sincerely,

lm
Enc.

CONTEMPT ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs,

-against-

69 Civil 407

UNITED STATES OF AMERICA,

Defendant.

IN THE MATTER OF

ANTHONY B. CATALDO,

AN ATTORNEY.

Anthony B. Cataldo, an attorney, having appeared before this court on May 10, 11 and 14, 1973 as pro se attorney and attorney for Ada W. Cataldo, and the said attorney, after having been admonished by this court with respect to repeated refusal to obey the direction of the court and repeatedly having interrupted the court and continuing to argue matters of evidentiary rulings contrary to the direction of the court, having been required to show cause why he should not be held for civil contempt, and after hearing the said Anthony B. Cataldo on the 11th and 14th days of May 1973, it is

ADJUDGED that the said Anthony B. Cataldo is guilty of contempt of court, and it is further

ADJUDGED that the said Anthony B. Cataldo be fined the sum of Fifty ($50.00) Dollars.

Dated: New York, N.Y.
May 18, 1973.

(SGD) RICHARD H. LEVET
United States District Judge

A TRUE COPY
THOMAS E. ANDREWS, Clerk
By [illegible]
Deputy Clerk

THOMAS E. ANDREWS,
Clerk

MR. CATALDO: There is no question --

THE COURT: I sustained the objection. When I rule that finishes it normally unless there's some necessity for argument about it. I see none on that one.

Your burden is to attempt to prove that you don't have to pay.

MR. CATALDO: My question goes only --

THE COURT: I ruled. I am not going to listen to you. If you go on, I am going to consider holding you for contempt. I am not going to allow it. Now you know.

MR. CATALDO: I don't want to argue with your Honor.

THE COURT: Don't then.

MR. CATALDO: The objection has no relevance to the question. The question only asks if he made an audit. He objects to something else and you sustain his objection.

THE COURT: Look, counsellor. You heard me say that I would consider holding you in contempt, and I am going to if you go on in this way. Please don't misunderstand me. I can't conduct a trial if you are an attorney and if you are pro se in the manner in which you

rent and expenses of the home.

THE COURT: Will you get through, please.

MR. CATALDO: I'm through now, sir.

THE COURT: All right.

I disallow the entire amount, the big sum of $7.80.

What is this Ascan?

MR. CATALDO: That's another month's rent.

THE COURT: That's the same thing, isn't it?

MR. REILLY: That will reappear, your Honor. Your prior ruling was one-quarter.

THE COURT: One-quarter is it now on this item.

MR. CATALDO: Before you do that may I tell you --

THE COURT: You may not say anything further about that. I have to bear down here.

MR. CATALDO: You don't have to bear if you will let me ---

THE COURT: I will let you say nothing more. It's the same thing as the other one. It's the same.

MR. CATALDO: No, it isn't. You didn't let me explain it the first time. You won't give me a chance to explain it the second time.

THE COURT: Do you know what I am going to do

now? I am going to ask you to show cause at this particular time as to why you shouldn't be held in contempt. I am not going to listen to this. Why shouldn't you be?

MR. CATAIDO: Because I am trying to tell you this item of $148, rent item --

THE COURT: You have gone all over that.

MR. CATALDO: No.

THE COURT: It's just another month.

MR. CATALDO: Just a minute. You didn't let me explain the use I make of my home, my business, and one more factor, that my business from my home, from my neighbors, was on the increase. In this year the increase was almost equal to the business I was getting from my New York clients and friends. Because of my activity at home, my business was increasing to the point where now, Judge, my present practice, consists almost 90 per cent of business derived from home activities as compared to before 1962 when there was a greater preponderance of New York business over the home business. There's very little home business. My activities were business oriented.

THE COURT: You see, every time you get into a factual answer you make a speech about it. I am going to rule.

Do you understand? First as to the reference

MR. CATALDO: I object to this. I object to this line of questioning. It's outside the scope of the issue.

THE COURT: He may have --

MR. CATALDO: Gross receipts are not income. The only thing that the deficiency --

THE COURT: Will you please stop talking. I may assist you.

I don't know how this is at issue here, frankly, Mr. Reilly.

MR. REILLY: Your Honor, --

THE COURT: Is there any contention made that he hasn't accounted for all his receipts?

MR. REILLY: Our contention is that the Wilma S. case was a trust account, your Honor. Therefore, if he is going to declare money in a trust account rather than his professional receipts, he can't then take a business deduction for it.

MR. CATALDO: That's not what happened.

THE COURT: Will you please keep quiet until I call upon you. Once more let me remind you that this little matter of contempt is going to hang over your head for a while unless you conduct yourself properly.

MR. CATALDO: This gentleman is accusing me,

Judge.

THE COURT: What's that?

MR. CATALDO: This gentleman is accusing me of taking money --

THE COURT: I am going to hold you in contempt now unless you have some explanation of it that is worth while. I am going to fine you $50. You keep quiet unless you are called upon. That's it. I will entertain application later to suspend it.

Will you tell me what your theory is.

MR. REILLY: Our theory is that the $1500 received from his client in the Wilma S. case was deposited in his trust receipts, not his professional-income receipts. If they were put in his trust receipts and he took $450 of that and sent it on to Mr. Lennon, he can't claim that as a business deduction.

THE COURT: I don't know why not. The only principle which I know of which might mitigate against it is the usual ethical thing. I believe it's more or less violated by the attorneys who pay forwarders for fees. So if he did pay a forwarder for fees, I don't know whether there's any reason why the IRS shouldn't recognize it.

MR. REILLY: I will try to make it a little more clear, your Honor.

the 7th too soon?

MR. REILLY: No, your Honor, that's all right.

THE COURT: That's it.

MR. CATALDO: You said also you would give me two days to reply to his findings.

THE COURT: I don't know that that is necessary. You serve yours and he replies to yours.

When did I say yours were to come in, Mr. Reilly?

MR. REILLY: On the 7th of June.

THE COURT: The 7th is on Tuesday. I will give Mr. Cataldo to the 9th.

62x MR. CATALDO: Thank you, sir.

THE COURT: There's still $50 due, Mr.Cataldo. I will enter an order unless there's some other disposition which I can make of this thing. You claim that you didn't have any money.

Do you have money in the bank?

MR. CATALDO: Not yet. I expect a check --

THE COURT: How do you live?

MR. CATALDO: That's a good question. I didn't spend a nickel over the weekend excepting for church contributions.

THE COURT: If you have money you should pay this fine. If you don't have money and you say you are a

pauper, I might remit it.

MR. CATALDO: I don't have money.

THE COURT: Do you have any cash anywhere?

MR. CATALDO: No, I have no cash, not the kind of cash your Honor is thinking about.

THE COURT: I am not thinking about any kind of cash.

MR. CATALDO: The only cash I have is $4 in my wallet.

THE COURT: Do you have something in the bank now?

MR. CATALDO: Not yet. I expect to. I am overdrawn at my account. You can call up the Marine Midland.

I respectfully move your Honor to remit the penalty because, as I told you before --

THE COURT: All right. I will decide that after I learn what you submit, what further proceedings there have to be here. You have occupied too much time and too much on the record here.

All right, gentlemen.

-All-

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ANTHONY B. CATALDO and ADA B. CATALDO, Plaintiffs -against- UNITED STATES OF AMERICA Defendant.	NOTICE OF MOTION
In the Matter of the Civil Contempt of ANTHONY B. CATALDO	

The undersigned will move this court at a Motion Term thereof to be held at the United States Courthouse at Foley Square in the Borough of Manhattan, City of New York before the Hon. Richard H. Levet, a Judge thereof, on the 11th day of October, 1974, at 9:30 o'clock in forenoon thereof or as soon thereafter as counsel can be heard for an order on the 10th day of May 1973, and remitting the penalty, and for such other and further relief that may be just and proper in the premises.

Dated New York, N.Y.

October 1, 1974.

Yours, etc.

ANTHONY J. CATALDO

Attorney pro se and for plaintiff

Office and P. O. Address
111 Broadway
New York, N.Y. 10006

TO: HON. RICHARD H. LEVET
JUDGE UNITED STATES DISTRICT COURT

CLERK OF THE ABOVE NAMED COURT

PAUL J. CURRAN, ESQ.
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY B. CATALDO AND AIA . CATALDO,

Plaintiffs,

-against-

UNITED STATES OF AMERICA

In the Matter of the Civil Contempt of

ANTHONY B. CATALDO

AFFIDAVIT

STATE OF NEW YORK)
) S.S.
COUNTY OF NEW YORK)

ANTHONY B. CATALDO being duly sworn deposes and says that he is an attorney-at-law duly admitted to practise law in the State of New York. He makes this affidavit, as the alleged contemnor, for an order vacating the order of contempt dated May 18, 1973 and for the remission of the fine of $50.

The order was made by the Hon. Richard H. Levett on the 16th day of May, 1973. It was made within the trial of a law suit wherein said Anthony B. Cataldo and his wife were plaintiffs against the United States of America seeking the return of monies unlawfully collected upon an unlawful assessment for income taxes for the year 1963. Said suit was dismissed after trial by said judge. After judgement was entered in that suit an appeal was prosecuted therefrom to the Court of Appeals, Second Circuit, and an order of affirmance was

made on the 23rd day of July 1974. On or about the 14th day of September 1974, deponent moved the Supreme Court for an enlargement of his time to file a petition for certiorari, but on the 25th day of September, 1974, the Clerk of the Supreme Court wrote deponent that said application was denied. Incidentally to said appeal, plaintiffs sought to have the order of contempt reviewed by the Court of Appeal but the Court refused to do so claiming to be without jurisdiction to do so.

Said order of contempt was erroneous in form and substance. Said order states that it was a civil contempt which the Court of Appeals said it was not. The Court of Appeals said it was a criminal contempt and the Court of Appeals said that no separate appeal had been taken from the order as a criminal contempt, it could not pass upon its propriety as it had no jurisdiction. A true copy of such decision is marked Exhibit "A" hereto. The said court disregarded appellant's claim that as a civil contempt it was unlawful, as to form as well as to substance. As a criminal contempt it is erroneous in substance because the essential ingredient to a criminal contempt is an intentional and willful obstruction of justice and there was no such action by deponent. In fact, the charge of contempt was made by the Court because of alleged failure of deponent to abide by the Court's instructions to adduce proof of the business nature of specfic items of expense without permitting deponent to adduce the ordinary

Deponent believed that at trial that a specific item was spent for business without showing how his business was conducted, generally, could make the specific claim of a business expense meaningless. Despite such difference of opinion with the court's approach to the way this case was to be tried, the alleged contemnor did abandon his plan of offering the proof of his case to the method directed by the Court. Also, there was no boisterous, loud, insolent language, nor did deponent once interrupt the orderly procedure of the trial, never once expressed any disregard for the dignity of this court, but he merely engaged in the time-honored pursuit of his profession, the submission of the facts which he honestly believed would support his case. See, In re. McConnell, 370 U.S. 230, 236-237.

The order of contempt is insufficient to hold the alleged contemnor as it fails to recite the actual acts of contempt committed, general accusations alone are not supportive of the charge. Also, there was no clear cut charge of contemptuous conduct made, no order to show cause was issued and no hearings held as is recited in the order in view of the said holding of the Court of Appeals, there has been no review of the said order of May 13, 1974, and none can now be had.

Deponent sought a review of it on the appeal from the judgment. On that appeal, deponent has argued that the order was erroneous in form, also he claimed contempt which calls for a fine is a criminal contempt. The Court of Appeals could not have converted that argument into what it called a

excusing a criminal contempt.

The trial minutes will support deponent's claim that he was never guilty of any criminal contempt of court. His brief on the appeal will show that he argued that the order was erroneous both as to form and substance. It is obvious that this court erred in misnamingthe order, as a "civil contempt" which had the result of depriving deponent of his right of review. Yet, plaintiffs have legitimate reasons for claiming that said order was unlawfully entered, and is entitled to a review of said order. However, it is hoped that upon a present consideration of the matter, the Honorable Court will vacate it and remit the fine. If it will not, it is respectfully requested to resettle the order so that plaintiff may have it reviewed by the Court of Appeals.

WHEREFORE, deponent respectfully prays this court, in the interest of justice, to set aside and vacate said order of May 10, 1973 and remit the fine of $50.

Sworn to before me
30th day of September, 1974.

ANTHONY B. CATTANO

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1105—September Term, 1973.

(Argued May 30, 1974 Decided June 25, 1974.)

Docket No. 73-2602

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Levet, *Judge*, denying appellants' claim for an income tax refund.

Affirmed.

ANTHONY B. CATALDO, New York, N. Y., *for appellants and pro se.*

T. GORMAN REILLY, Assistant United States Attorney, New York, N. Y. (Paul J. Curran, United States Attorney for the Southern District of New York, New York, N. Y.,

and David P. Land, Assistant United States Attorney, of counsel), *for appellee.*

PER CURIAM:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, denying appellants' claim for an income tax refund for the year 1963. Appellants have broadly attacked the decision of the District Court and the fairness of the proceedings before it. We have carefully considered the record and the transcripts of that trial and the briefs submitted to us by the parties and have concluded that appellants were afforded a fair trial and that the District Court did not err in finding for the Government. We therefore affirm.

In the course of the proceedings in the District Court, appellant Anthony B. Cataldo was summoned to show cause why he should not be held in contempt.[1] A judgment so holding was filed on May 18, 1973. Although appellants proffer various arguments attacking the validity of this latter judgment, no appeal has been taken from it and we therefore lack the jurisdiction to undertake its review.

Judgment affirmed.

1 Although Cataldo was summoned to show cause why he should not be held for civil contempt, both appellants and appellee now treat the contempt judgment as if it were criminal in nature and, indeed, it would seem likely in light of the circumstances surrounding it that it was the judge's intent that it should be so construed.

365—6-26-74 • USCA—4081

MEILEN PRESS INC., 445 GREENWICH ST., NEW YORK, N. Y. 10013, (212) 966-4177

219

ANSWERING AFFIDAVIT OF DAVID P. LAND

(CAPTION)

JURAT

DAVID P. LAND, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and I represent the defendant.

2. This affidavit is submitted in opposition to the motion by Anthony B. Cataldo to be relieved of a $50 contempt fine imposed upon him by this Court on May 18, 1973. The District Court docket indicates that $50 was paid to the Cashier on May 31, 1973.

3. It is my view that Mr. Cataldo's current motion should be viewed as a collateral attack on the contempt judgment, which collateral attack is barred by the doctrine of res judicata.

4. Mr. Cataldo appealed the adverse judgment in his tax refund suit to the Second Circuit. As to Mr. Cataldo's right to contest his contempt, the Court of Appeals held:

> "Although appellants proffer various arguments attacking the validity of this latter [contempt] judgment, no appeal has been taken from it and we therefore lack the jurisdiction to undertake its

review." Cataldo, et ux. v. United States of America, Docket No. 73-2602 (No. 1105, 2d Cir., June 25, 1974).

In his current papers Mr. Cataldo indicates that his attempt for Supreme Court review has been unsuccessful. Accordingly, Mr. Cataldo has exhausted his appellate remedies. Now, well over one year after the contempt judgment became final, Mr. Cataldo seeks collateral review. Notwithstanding that Mr. Cataldo's motion would otherwise be barred by the doctrine of laches, it is clear that under the doctrine of res judicata a final judgment is not subject to collateral attack.

5. In the last paragraph of Mr. Cataldo's supporting affidavit dated September 30, 1974, Mr. Cataldo asked that the Court "resettle the [contempt] order so that plaintiff may have it reviewed by the Court of Appeals." Such a request is merely an attempt by Mr. Cataldo to obtain by indirection that which he failed to obtain directly. Mr. Cataldo offers no excuse why he failed to timely appeal the contempt judgment.

WHEREFORE, it is respectfully submitted that Mr. Cataldo's current motion be denied.

DAVID P. LAND
Assistant United States Attorney

Sworn to before me
this 7th day of October, 1974

WALTER G. BRANNON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs,

-against- 69 Civil 407

UNITED STATES OF AMERICA,

MEMORANDUM

Defendant.

- -

APPEARANCES:

Anthony B. Cataldo
Attorney for plaintiffs and pro se
111 Broadway
New York, N.Y.

Whitney North Seymour, Jr., United States Attorney
for the Southern District of New York
Attorney for Defendant
David P. Land, Assistant United States Attorney,
Of Counsel.

LEVET, D. J.

On May 10, May 11 and May 14, 1973, during a trial held before the undersigned, the court determined that Anthony B. Cataldo ("Cataldo") was in contempt by reason of his acts during the trial. A contempt fine of $50 was imposed by order of May 18, 1973. On or about May 31, 1973 Cataldo paid the said fine of $50.

Thereafter, although an appeal was taken on the action itself (a tax recovery suit), no appeal was taken from the contempt

order. At the time of the appeal to the Second Circuit Court of Appeals the court entered the following notation:

> "Although appellants proffer various arguments attacking the validity of the latter [contempt] judgment, no appeal has been taken from it and we therefore lack the jurisdiction to undertake its review." Cataldo, et ux. v. United States of America, Docket No. 73-2602 (No. 1105, 2d Cir., June 25, 1974).

Now, under a notice of motion dated October 1, 1974, the above-named Cataldo moved for an order remitting the penalty upon an affidavit signed and sworn to September 30, 1974.

The basic determination in the District Court by the undersigned was affirmed by an order of affirmance on July 23, 1974, and an application by Cataldo to the Supreme Court for enlargement of his time to file a petition for certiorari was denied by the Supreme Court on September 25, 1974, as this court is informed. As above stated, the Court of Appeals refused to review the contempt order.

On October 15, 1974 the court received a letter from Cataldo dated October 14, 1974, which letter is attached hereto.

Under the above circumstances, I see no basis whatsoever for the granting of the application made by Cataldo. It is therefore denied.

So ordered.

Dated: New York, N.Y.
October 16, 1974.

(SGD) RICHARD H. LEVET
United States District Judge

LAW OFFICES
ANTHONY B. CATALDO

962-0965
CABLES: LAWSABCAT

111 BROADWAY
NEW YORK, N.Y. 10006

LETTER OF ANTHONY B. CATALDO DATED OCTOBER 14, 1974

962-0965
xxxxxxxxxxxxxx

111 Broadway
xxxxxxxxxxxxxxx
xxxxx
10006

October 14, 1974

Cataldo v. U.S.A.
69 Civ. 407 (RHL)

Hon Richard H. Levet
United States Courthouse
Foley Square
New York, N.Y. ;0007

Honorable Sir:

The assistant United States attorney's affidavit opposing my motion to vacate your order of contempt or make it possible for me to have a review of it advances as a defense, the doctrine of res judicata but it cites no authority to support him. The motion is a direct attack upon the order, not as stated by my opponent, a collateral attack. My failure to have a review of it is the fault of the court not mine. Mr. Land's arguments are made to confuse, not to get at the truth of the matter and apply the law properly. He avoids mentioning the reasons of the Court of Appeals for holding that they lack jurisdiction, both aof wnich were not factually correct. As they had no jurisdiction, jurisdiction still resides in this court. Hence, this court has the matter properly before it.

Also, Mr. Land is quick to call attention to the one year limitation; but he overlooks the likitation of the one year placed upon it by Rule 60. The many reasons for attacking an invalid judgment not subject to the one year limitation are the exception to the rule, and this is one of them.

This kind of argumentation by a knowledgeable United States Attorney can be called fraudulent. He knows better than to claim law which is either non-existent or inapplicable,

and, it is clearly fraudulent to misstate a fact. This is what he is doing. This is what he and his co-counsel did at the trial. This court took umbrage at me and held me for contempt because I tried to tell this court, in answer to the court's inquiry, that defense counsel was impugning my professeonal ethics of which there was no proof, in the line of questioning he was conducting. He knew my books forwards and backwards and he knew better than to ask me if I had paid a legitimate bill out of trust funds. Yet, he was advancing that idea in the hope that this court would accept the innuendo.

The trial record reveals many instances of counsel's claims to non-existent or inapplicable law which were adopted to arrive at a dismissal of the complaint. Despete the affirmance, a re-examination of the trial record will prove to this court's satisfaction that the dismissal was wrongfully provoked by defense counsel.

Waile, I would certainly desire an opportunity to prove this last point, the only thing now before the court is my motion addressed to an order obviously wrong and prejudicial to me. I hope that this attack on defense counsel does not induce this court to deny my application. I sincerely want this court to believe that it has been by experience to find government lawyers to have a nigh intelligence but it is used to find ways and means to win for the government even if the effort frustrates the very ends of justice. They know that a final decision in their favor is eo instanto, its own justification.

Sincerely,

ABC:ac

C.C. Hon Paul J. Curran
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY B. CATALDO and
[illegible],

Plaintiffs

-against-

UNITED STATES OF AMERICA

Defendant.

NOTICE OF APPEAL

73 Civ. 407

In the Matter of the Civil Contempt of ANTHONY B. CATALDO

S i r s :

PLEASE TAKE NOTICE that plaintiffs do hereby appeal to the United States Court of Appeals, Second Circuit from the order of the Hon. Richard H. Levet made October 16, 1974 and filed on October 17, 1974, denying plaintiffs' motion to vacate the order of contempt dated May 16, 1973 and to remit the penalty or to enter an order which would permit an appeal therefrom to be prosecuted and heard and from each and every part of said order.

Dated, New York, N.Y.
November 18, 1974

Yours, etc.,

ANTHONY B. CATALDO
Attorney pro se and for the plaintiff
Office & P.O. Address
111 Broadway
New York, N.Y. 10006

TO:

Hon. PAUL J. CURRAN
United States Attorney
United States Courthouse
Foley Square
New York, N.Y. 10007